



U.S. MERIT SYSTEMS PROTECTION BOARD

Case Report for December 2, 2022

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BOARD DECISIONS

Appellant: John Doe

Agency: Department of State

Decision Number: [2022 MSPB 38](#)

Docket Number: NY-4324-15-0127-A-1

Issuance Date: November 29, 2022

Appeal Type: Attorney Fees

ATTORNEY FEES, CONTINGENCY CONTRACTS, REASONABLENESS

The appellant filed an appeal under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) alleging that the agency failed to afford him differential pay during a period in which he was absent from his position due to active military duty. The appellant was represented throughout the proceedings by an attorney who practices law in San Diego, California. The retainer agreement between the appellant and his attorney did not reflect an hourly rate and instead stated that the attorney was entitled to a portion of any recovery. In the initial decision, the administrative judge found that the appellant was entitled to differential pay during the relevant period and granted the appellant's request for corrective action. The appellant filed a motion for attorney fees under 38 U.S.C. § 4324(c)(4), which permits the Board to award reasonable attorney fees under USERRA. The

administrative judge issued an addendum initial decision, which found that the 116.2 hours of work that the appellant's attorney claimed was reasonable and that his claimed hourly rate of \$650 was not reasonable. Instead, she found that \$425 was a reasonable hourly rate. The appellant filed a petition for review asserting that the administrative judge erred in reducing the hourly rate.

Holding: A reasonable hourly rate for the appellant's attorney was \$425.

1. An administrative judge has discretion to award "reasonable attorney fees" if the Board issues corrective action in a USERRA appeal. 38 U.S.C. § 4324(c)(4).
2. The Board will use the "lodestar" method for calculating attorney fees in USERRA matters, in which it multiplies the hours reasonably spent on the litigation by a reasonable hourly rate.
3. The appellant bears the burden of showing that the requested fees were reasonable. To do so, he is required to provide evidence of his attorney's customary rate and that the rate was consistent with the prevailing rate for similar services in the community in which the attorney ordinarily practices.
4. Although an appellant's agreement to pay a specific fee for legal services rendered in a Board appeal creates a rebuttable presumption that the agreed-upon fee is the maximum reasonable fee that may be awarded, the appellant's contingency-fee retainer agreement in this case did not indicate an hourly rate. Accordingly, the Board considered other evidence to determine the appropriate hourly rate—specifically, the attorney's customary rate and whether that rate was consistent with the prevailing rate for similar services in the community in which the attorney ordinarily practices.
5. The Board found that fees awarded in comparable Board litigation, and not fees awarded in USERRA litigation in Federal district court, most accurately reflect the prevailing community rate for similar services in the community in which the attorney ordinarily practices. In considering Board cases concerning attorneys in the San Diego area, the Board agreed with the administrative judge that \$425 was a reasonable hourly rate.
6. The Board stated that a settlement for attorney fees in a different USERRA differential pay case, which concerned a different agency, was insufficient to warrant a different outcome because an agency's decision to settle may be based on myriad considerations which are unrelated to the reasonableness of the attorney's hourly rate.

COURT DECISIONS

NONPRECEDENTIAL:

Sutton v. Office of Personnel Management, No. [2022-2231](#) (Fed. Cir. Dec. 1, 2022) (MSPB Docket No. DC-0841-22-0513-I-1). The court dismissed the petition for review for failure to file the required Statement Concerning Discrimination and failure to pay the docketing fee.

Grissom v. Merit Systems Protection Board, [2022-1332](#) (Fed. Cir. Nov. 30, 2022) (MSPB Docket No. AT-1221-21-0204-W-1). The court affirmed the dismissal of the appellant's individual right of action appeal for lack of jurisdiction, finding that his claims were barred by the doctrine of collateral estoppel. The court found that the appellant failed to prove that he was denied the right to submit evidence before the administrative judge because he did not describe what evidence he wished to introduce or how he was denied the opportunity to present it.

Grissom v. Department of Veterans Affairs, [2021-2124](#) (Fed. Cir. Nov. 30, 2022) (MSPB Docket No. AT-0714-21-0175-I-1). The appellant appealed his removal, taken under the authority of 38 U.S.C. § 714, to the Board and asserted an affirmative defense of whistleblower reprisal. The administrative judge issued an initial decision, which became the Board's final decision, sustaining the charges, denying the appellant's affirmative defense, and upholding the removal. The court affirmed the Board's determination that the appellant failed to prove his affirmative defenses. The court found that, although the Board correctly found that the agency proved its charges against the appellant, the agency did not prove that it considered the factors set forth in *Douglas v. Department of Veterans Affairs*, 5 M.S.P.R. 280 (1981), in assessing the reasonableness of the penalty, as it was required to do by *Connor v. Department of Veterans Affairs*, 8 F.4th 1319 (Fed. Cir. 2021). Accordingly, it vacated the Board's decision as to the underlying removal, affirmed the decision as to the appellant's affirmative defense, and remanded to the Board to remand to the agency for a redetermination of the penalty.